UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

COMMENTARY ON THE PRELIMINARY DRAFT UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

WITH PARTICULAR CONSIDERATION OF ITS RELATIONSHIP TO THE 1970 CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY

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This preliminary draft Convention was drawn up by a study group of experts in three sessions held at the UNIDROIT Headquarters in 1988, 1989 and 1990.

The origins of this draft Convention go back quite a long way. A major concern of Unesco has been for many years the illicit traffic in cultural objects. In 1970, Unesco drew up and adopted the 1970 Unesco *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.* This Convention has now been adopted by 69 States. It contains provisions upon which States Parties undertake to adopt a wide variety

of measures to counter illicit traffic of cultural property : such as the establishment of appropriate national services for the protection of cultural property, regulation of import and export, measures in the field of education and public information. Some important provisions also deal with the question of restitution of stolen and illegally exported cultural property. However, one of the problems facing the drafters of that Convention was the fact that many of the issues which had to be dealt with were matters of private law in which, it could be argued, Unesco, strictly speaking, has no expertise and no mandate. The Convention provided that States should do their utmost to prevent the illicit trade. However, it has become clear that one of the problems of the illicit trade is the protection givea to the *bona fide* purchaser of stolen cultural objects. This problem is clearly illustrated by the notorious case of *Wlnkvorth v. Christie's.*[1]

In *Nlnkworth v. Christie's,* an English collector of Japanese miniatures who had had his *netsuke* collection stolen from him, recognized it when it came up for sale at Christies two years later. He claimed it back. The seller was an Italian count who had acquired it, in good faith, in Italy. The court applied the rule of *lex rel sitae* (the place where the last transaction took place : in this case, Italy), and held that the seller had a good title, even against the original owner and although the original owner would have been protected had

1 **[1980] 1 Ch. 496 [England].**

English law applied.

The result of *Wlnkworth v. Christie's* illustrated clearly that stolen goods could be funnelled with little problem through countries which protected the *bona fide* purchaser. Since *bona fides* is in most cases presumed[2], the effect was to encourage purchasers to buy objects without enquiring into their provenanco and without requiring proof of ownership. This lamentable state of affairs has certainly contributed to the growth of the illicit trade.

The French expert Jean Chatelain recommended in his report in 1976 [3] that moves be taken to overturn the protection of a *bona fide* purchaser, at least in respect of cultural objects. The Council of Europe in drafting its *Convention on Offences against Cultural Property* (1985) did, in the course of drafting, propose a principle which would reverse the onus of proof and require purchasers to prove their *bona fides.* However, because this was a provision on Civil Law, and the Convention was being drafted by the Committee on Penal Law, it was felt that it should not appear and the provision was dropped. This meant that there were still no provisions on

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2 For a discussion of this issue in relation to cultural objects see Prott, L.V. and O'Keefe, P.J. *Law and the Cultural Heritage : Vol. Ill - Movement* (Butterworths, Sevenoaks, U.K.) 1989, 409-416.

3 Chatelain, J. *Means of Combatting the Theft of and Illegal Traffic in Works of Art In the Nine Countries of the EEC* (Commission of the European Communities, Doc. XII/757/76-E (1976)) 114.

private law to complement those on public law in the 1970 Convention.

In 1982 this author and Professor O'Keefe of the University of Sydney in a report to Unesco[4], recommended that some of the outstanding issues of private law which had influence on the illicit trade should be referred to an international organization which dealt with private law matters, such as The Hague Conference on Private International Law or the International Institute for the Unification of Private Law (UNIDROIT). Unesco accepted this suggestion and approached UNIDROIT. UNIDROIT commissioned, with Unesco funds, two studies from Professor Reichelt[5] of the University of Vienna, on possible changes to the *bona fide* rule. On the basis of these reports, the UNIDROIT Governing Council decided to call together a study group of experts who would examine the problem.

General Provisions

The first session of the study group was given some guidelines from Professor Monaco, President of the Institute. There was also a draft Convention drawn up by the Austrian expert in

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4 **Prott, L.V. and O'Keefe, P.J. *National Legal Control of Illicit Traffic in Cultural Property* (Unesco Document - CLT-83/WS/16, 1983) 126-130).**

5 **Reichelt, G. "International Protection of Cultural Property" (1985) *Uniform Law Review 43* (1st study); *International Protection of Cultural Property* (2nd study), (UNIDROIT, Rome) undated.**

private law, Dr Loewe. This draft Convention had a number of remarkable features. One of them was to avoid any mention of *"bona fides",* although the draft would clearly affect the operation of that rule. This would discourage judges from applying, consciously or unconsciously, their own standards of *bona fides* even though the Convention was attempting to modify those in some way. This feature of Professor Loewe's draft, which was clearly a sound drafting basis, has been retained in the final draft.

Another significant feature of the Loewe draft was a differential standard of care required depending on the value of the item concerned. This was expressed as a monetary value. The majority of the experts were not happy with this kind of solution because they felt, and in this they would be supported by many cultural experts, that one should not assess the value of a cultural object on the basis of its commercial value. Some objects of small commercial value have gr^at cultural importance : this is true of some ethnographic objects for example. On the other hand, sometimes the commercial value of the object may be much higher than what is seen as its significant cultural value. This provision was therefore abandoned and some other way of delineating the standard of care had to be adopted.

The original draft had the title "Convention on the International Protection of Cultural Property". This has been

considerably modified in the final draft to read "Convention on stolen or Illegally Exported Cultural Objects". One member of the study group felt that "protection" was not necessarily enhanced by preventing the object being in illicit trade. It might well be that the physical protection of the object was better in the hands of its new possessor than it '«as in its country of origin. As against this could be argued the many cases of damage caused by the unprofessional practices of illicit traders which made "protection" a proper text to use, and the general use of the term "protection" in national laws.[6] Another member of the study group objected to the use of the word "property" and would have preferred the word "heritage". The reason for this was that "property" has certain commercial connotations and it was preferable to avoid these when speaking of objects whose primary value was cultural. This expert pointed out that the phrase "biens culturels" in French, had in fact a long legal history, but the phrase "cultural property" had only been used in English since the 1954 Hague Convention. Modern practice favoured use of the word "heritage". Another expert objected to the use of the word "heritage" which he thought had emotional connotations. It was therefore decided to use the neutral word "objects". The ambit of the Convention was then mada clear in Article 1.

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6 Even in the most carefully controlled conditions, such as in the current museum exchange of significant international exhibitions, damage occurs. How much more is this the case when traffickers, with no expertise in the conservation of cultural objects, take by stealth.

Another suggested title included the words "restitution" and "return" of cultural goods. This phrase was said by its drafter to mean that "restitution" covered the return of stolen goods to their owner whereas "return" covered the sending of illicitly exported goods back to their country of origin. It was pointed out that the terms "restitution" and "return" had evolved with specialized meanings in the Unesco context, in particular through the practice of Unesco's Inter-Governmental Committee for Promoting the Return to its Countries of Origin of Cultural Property or its Restitution in Case of Illicit Appropriation. It would be confusing to use these words in another sense in this Convention. It was therefore decided to avoid these terms.

Several times issues arose during discussion which it was decided not to deal with in the substance of the Convention but rather in the Preamble, which would be drafted at a later stage. This is perhaps unfortunate, since Preambles are a useful aid to interpretation and require careful drafting. When time is short in negotiating conferences they are sometimes put together hastily and it would be unfortunate if some of the points which the Committee thought should be in the Preamble were omitted by oversight. Here are some of the points suggested.

Clearly the Preamble needs to mention the motivations which led to its drafting t the serious and increasing threat of the illicit trade to the protection of the cultural heritage; the

association of illicit traffic with funds derived from othor illegal activities, the need to harmonize the rules of private law to prevent their assisting illegal traders and the need to complement other methods of control (public law conventions, professional codes of ethics, etc.)*

Opinion in the Committee was divided as to whether reference should be made in the Preamble to the 1970 Unesco Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. The Preliminary Draft Convention was very carefully drafted to be compatible with the 1970 Convention, so a reference to its seems logical, especially since the UNIDROIT draft was intended, right from the start, to complement and complete the protective scheme of that Convention. On the other hand, the Preliminary Draft can also stand quite independently, and can be adopted by States which are not party to the Unesco Convention : some thought that a reference to the Convention might deter such States from adopting the Convention.

In considering the question of retrospectivity the Study Group did consider that mention should be made in the Preamble that the Convention was not designed to recognize a fait accompli for past exports : i.e. the draft Convention is not going to deal with the recovery of objects which were stolen or illicitly exported before its date of entry into force, but this did not imply approval of them : merely that issues

concerning such objects should be settled by other means.

Article 2 has A very broad definition of the words "cultural object". The question of defining "cultural object" or "cultural property", as it was called in the earlier versions, had been discussed by Professor Reichelt in her study and had been considered by the study group at each of its sessions. In view of the very broad disparity between national legislations in defining this concept, and the great variety of definitions in international instruments, it was felt unfruitful to try and pursue a detailed definition. However this broad definition will have to be applied by the judges of States who are dealing with applications for the return of cultural objects. It is therefore in the hands of those who would have most interest in defining this concept fairly specifically and perhaps narrowly. The more detailed enunciation of this definition is therefore left in the hands of those who have to apply the Convention, but it was felt that judges would be sensitive to the cultural value of an object in another society which was not so valued in his or her own. This has been the case, for example, of judges in societies of Western European culture when considering objects of cultural value to indigenous communities.[7]

The question of definition was raised in particular in respect of classification of objects, one expert felt that it

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7 *F.G. Charrler v. Bell* 496 SO. 2d 601 (1986) [United States]; *Onus v. Alcoa* (1981) 36 A.L.A. 425 [Australia].

was necessary to have as precise a definition as possible of the goods that would be covered by the Convention. While this is possible in systems that already have large scale classification, it is not possible for those like most of the English speaking countries and many developing countries which do not. It requires a highly experienced and a fairly large cultural bureaucracy to be able to undertake the classification process and it was felt *toy* the majority of experts that to require a classification of goods to take place before the Convention would have effect would simply make it unattractive to the majority of States.

Provisions on Theft

Perhaps the most significant provision in the Convention is that of Article 3(1). This provision clearly reverses the protection of the *bona fide* purchaser of cultural objects. The existing rule in Civil Law countries protects the *bona fide* purchaser by ensuring that no action can be brought against him of her after a relatively short period of time (5 years in Switzerland, 3 years in France and Netherlands, with no delay in Italy). This exclusion of claims acts as a transfer of title to a new owner, who can then pass the title to another person. The original owner cannot retrieve the object, nor is compensated for its value. Indeed, in most systems, even if he acts within the stipulated period, he must compensate the possessor if the object was bought by the

latter in a market or from a dealer who handles such wares. The rule is said to ensure the free circulation of goods.

On the other hand Common Law (English speaking systems) follow the rule phrased in Latin as *Nemo dat quod non habet* (No-one can give what he has not got, i.e. a thief cannot pass good title to another party). Thus the acquirer of stolen goods must hand them back to the true owner and receives no compensation.

It was clear to the experts of the study group that no decision was being made as to the relative value of the *nemo dat* rule or that protecting the *bona fide* purchaser. On the one hand it can be argued that the owner has done nothing to deserve the loss of his goods and therefore that the *nemo dat* rule is fair. On the other hand it can be argued that the *bona fide* purchaser has also done nothing to deserve to be deprived of his goods. In practice it is clear that placing liability on the *bona fl<"e* purchaser to return stolen cultural objects will make him or her much more careful in the purchase procedure and will make purchasers more likely to require proper proof of provenance and title. Since the purpose of the draft Convention is to help control illicit traffic, this is clearly the better solution.

However, the protection of the *bona fide* purchaser has been seen by some to be a fundamental principle of the Civil

Law and one which much encourages the freedom of trade. For this reason it was felt not realistic at this stage to expect the Civil Law countries not only to reverse the rule which allowed a *bona fide* purchaser to keep the object which he had acquired but also to require him to restore it without compensation for his loss. The most significant thing in hindering the illicit trade would be to ensure that a cultural object is returned to its previous location and this the new draft Convention would ensure t the possessor of a stolen cultural object shall return it (Art. 4(1)).

Article 4 provides for compensation vhere a possessor can prove it has exercised "the necessary diligence". It can of course be argued that the owner of goods which have been stolen should not have to pay to hava them returned. It is contrary to the policy of the Common Law (English speaking legal systems).

The provision of compensation (Art. 4(l))would make the solution sore acceptable to those States for whoa the protection of the *bona fide* purchaser has been fundamental. This is, nonetheless, a compromise solution, and not the most effective one. The most experienced Civil Law scholar on legal protection of the cultural heritage summarized the position thus :

> **...."genuinely effective protection of the property concerned is impossible without total abolition of**

> protection for purchasers - i.e., by stipulating restitution without compensation in all cases. For speculation in art objects is such that after several successive sales they can quickly fetch considerable prices. If the legitimate owner is to be obliged to pay back the purchase price, recovery will often be impossible. Again, this would constitute indirect protection not only of the final purchaser but also of all those through whose hands the object has passed."[8]

If this is the case in the European context for which Chatelain was writing, it is even more so for owners (individuals, museums and communities) in poorer States.

Nonetheless the draft Convention allows compensation only where the purchaser has used the necessary diligence. A *borw fide* purchaser of stolen goods who cannot prove that he has proceeded with care in the transaction may be under an obligation to return the object without the right to any compensation. The provisions of Article 3 and 4 apply, it should be noted, not only to external, but also internal trade, altering where necessary, for the very special category of important cultural objects, the normal national rules of private law on the transfer of movables.

In addition to the factors which are already mentioned in Article 4(2) as tending to show whether the necessary diligence has been provided, other indications could be given. Some of these were originally included in the text of the draft but it <*as ultimately decided to relegate them to the

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8 Chatelain, J., work cited N. 3, 114.

commentary. Such factors are the nature and provenance of the object, the qualities of the acquirer and the transferor and his trade, any special circumstances in respect of the transferor's acquisition of the object which are known to the possessor or provisions of the contract and any circumstances in which it was concluded.

The group also discussed the meaning of "stolen". This would be decided by the judge on his own view of the appropriate abmit of the concept of theft applying, if appropriate, the law of another jurisdiction to determine that question.

Article 3(2) limits the claims for specific restitution by a timt limitation of three years from the time when the claimant knew or ought reasonably to have known the location of the object or the identity of its possessor. This is an uncertain period but it is one that has received a lot of judicial consideration, especially in a number of cases in the United States. The difficulty will be to establish when an owner should have known the whereabouts of the object. Is it sufficient when an object has been publicly displayed but in a foreign country ? Is it sufficient if its acquisition has been described in local newspapers ? Is it sufficient if thra owner has made diligent enquiries but nonetheless has failed to establish the exact location of the object, even though a person in the general locality of the object would have known of its existence ? These questions will have to be settled by interpretation of the

Convention.

There is also a further limit of 30 years from the time of the theft. The question of the long limitation, 30 years from the date of the theft, was discussed. Thirty years is, in the writers' opinion, too short a period. There are numerous cases where goods were stolen during the Second World War and have only been recovered very much later[9]. Lawyers in jurisdictions where the *nemo dat* rule (explained further below) applies may find it strange that genuine owners should be excluded froK recovery of stolen goods simply because the possessor has been particularly efficient at hiding them. Thirty years is, after all, not a long time in the life of a cultural object. Such objects can be easily concealed in bank vaults and returned to the market when the limitation period has expired. Furthermore, in countries such as France where museum collections are in public hands, cultural objects stolen from them are inalienable and imprescriptible. Why should museum collections regarded in law &s private property (as is the case of most museums in English speaking countries) be less

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9 ***Menzel v List*** **253 N.Y.S. 2d; 267 N.Y.S 2d 804, aff'd 298 N.Y.S. 2d 979 (1969) a lapse of 21 years; *Kunstsammlungen zu Weimar v. Ellcofon* 536 F. Supp. 829 (1981), 678 F. 2d 1150 (1982) 21 years; *De Weerth v. Baldinger* 836 F. 2d 103 (1987) 36 years; another case concerned a painting stolen in 1936 during the Spanish Civil War and not seen again until 1971, a period of 35 years : *United States* v. *Herce* 334 F. Supp. Ill (1971) [All United States]. In 1990 the case of the Quealinburg treasures was revealed : these very important cultural objects (early Gospels, reliquaries etc..) were stolen from the treasury of a Convent Church at the end of World War II and were being sold by his successors in 1990 - 45 years after the theft; IFA Reports n* 4, July 1990.**

protected ? Fortunately Art. 11(a)(ii) allows States parties to apply their own law where this would give a longer period for recovery, and Common Law countries should take advantage of this provision to retain their present, more generous system.

Provisions on Export

Another very significant and innovative provision is that of Article 5. Article 5 provides for the return to a requesting State of an object which has been illegally exported from that State. The question of returning illicitly exported objects has been a lively one in the last three decades. The well known case of *Attorney General of New Zealand v. Ortiz,*[10] showed that the existing provisions are entirely unsatisfactory. In that case, the New Zealand government failed to obtain the return to it of an important Maori carving which had illegally exported from New Zealand and was on sale at Sotheby's. The decision rested on an old theory that a state should not apply foreign public laws. There have, however, been dramatic developments in this view in recent years, both theoretical and practical, whereby laws of another State are likely to be applied by courts in a number of countries. The text has followed these developments by providing a specific procedure whereby a State can request the return from another State Party an object the export of which was contrary to its own law.

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10 **1982 I.Q.Be 349; [1982] 3 W.L.R. 571 (C.A.) [United Kingdom].**

There is a significant distinction to be noted between provisions on stolen and those on illegally exported object. Anv cultural object of importance which has been stolen falls within the provisions of the Preliminary Draft Convention (Art. 3). Some States, however, have consistently refused to recognize the wide-ranging export controls imposed by some States on all cultural objects, or all objects of archaeological interest (Mexico, Nigeria and Turkey are some examples of countries which have such broadly based export controls). The objecting States have argued that such controls stifle the distribution of cultural material and encourage the illicit trade. It seems clear that if the Convention required the acceptance of such broad export controls, some important trading States would not become party. Accordingly, to invoke the provisions of the Preliminary Draft Convention, a State would have to prove not only that a cultural object has been exported contrary to its legislation but also that the removal of the object significantly impaired one of the interests specified in Article 5(3): the physical preservation of the object or of its context, the integrity of a complex object, the preservation of information of a scientific or historical character, the use of the object by a living culture, or the outstanding cultural importance of the object for the requesting State. This is a most innovative provision. It suggests that these objects will be of a certain degree of significance; the convention is not designed to apply to a mass of objects which could be termed cultural but are of much less importance, not only monetarily

but culturally.

The physical preservation of the object is an obvious criterion; its context (Art. 5(3)(a)) covers the situation of an archaeological object which, when removed from its proper context loses much of its value and also destroys much of the information that can be retrieved from that site. It also covers cases whera objects have been reaoved from excavations before they have been properly stabilised. The integrity of a complex object (Art. 5(3)(b)) is meant to cover those sorts of cases where part of an object has been removed eg. one statue from a monument, one section of a triptych etc. The preservation of information (Art. 5(3)(c)) covers in particular archaeological sites but also the taking of an object from a collection or ensemble (e.g. of ethnographic objects) which give information about customs, usages or techniques that will be lost by separation.. The use of an object by a living culture (Art. 5(3)(d)) will cover a number of ethnographic items which may not fall within one of the other qualifications and will, of course, include objects of religious significance. The final provision (Art. 5(3)(e)), the outstanding cultural importance of the object for the requesting state, was meant to cover some significant cases which may not fall precisely under one of those other headings. An example might be the Maori carvings in the Ortiz case which had been buried up until the time they had been abstracted by the seller to the dealer who sold them to Ortiz. It would be hard therefore to argue that it

was being used as an item of a living culture because, although the New Zealand government wanted to use the carvings as an inspiration to younger Maori carvers, that had not been done up until the time of the illegal export. Nonetheless there is little doubt that the New Zealand government could have proved that these panels were of outstanding cultural importance to the New Zealand people. The question that may be asked about this provision is what sort of evidence will be needed and how hard
will it be to prove these cases. This is something which cannot be decided at this point and it will be developed in case-law.

Some of the kinds of factors which would be relevant were raised in discussion : the richness of existing stock of heritage objects in the requesting State, whether in private, or in public hands, the degree of uniqueness of the object and its significance in the cultural history of that state. Some hesitations may be felt in importing States that this category is too wide and will open the door to all sorts of extravagant claims. This is not its intention, nor is it likely to have that effect. After all, it is the court of the importing State which is to decide whether a claim has been made out for return. Mustering the evidence to prove this category is not goirg to be easy, and States are not likely to attempt it for objects which are not of great importance to them. The controls are implicit in the mechanics of the system.

One piece of evidence which could be brought would be an arrangement between the requesting State and the former possessor of the illegally exported object under which the latter agreed, in return for certain advantages such as tax concessions, to make the object accessible to the public. This was proposed by one member of the working group as a separate category to be Article 5(3)(b) but finally it was decided that this was evidence which could be brought to establish outstanding importance under Article 5(3)(e).

At the second session of the Study Group the experts had before then a formulation of the article which is now Article 5 which would include a provision for a court to order return on condition that t

a) the object has, at the place where it is currently located, a value in excess of 25,000 Secial Drawing Rights [or] [and]

b) the requesting State proves that the removal of the object from its territory significantly impairs one of the following interests
(There followed the interest now listed in Article 5(3))

This was not acceptable if cumulative ("and"), since it would have excluded from recovery objects of great importance to the culture of a requesting State solely on the basis of its commercial value, a position clearly unacceptable to many cultures. However, as an alternative means of proof ("or") it

had certain merits. For example, if the sum were to be set at say $ 100,000 or $ 200,000, the New Zealand Government would not have had to prove, in the case of the Taranaki panels, any of the alternatives set out in the present form of Article 5(3) - not that they are unimportant, or that adequate proof could not have been brought to satisfy one of those categories, but proof could have been very much simpler, since the commercial value (assessed for estimated auction value) was £ 250,000 and would have been very easily proved, without the need to import specialists in the culture concerned, as may turn out to be needed to prove the other cultural values.
It would, therefore, have been a way of lessening the cost of litigation to requesting States with few resources. If a requesting State found it unacceptable, even for purposes of recovery, to discuss an important cultural object in monetary terms, then it could, of course, elect not to use this provision, but bring its proof under one of the cultural heads.

This view did not find a consensus on the Committee. It had the additional disadvantage that it was the only provision left in the draft at the second session which used financial terms and, therefore, would require a choice of the level of the amount to be fixed and the choice of a currency (Ecus ?, US$7, Stg .'<; ?). It also raised questions about adjustments for inflation. These practical considerations have a strong influence on the experts* decision to drop the sub-clause.

There was some concern within the Committee of experts that objects that were returned should not find themselves again on the market because they were not properly cared for by the requesting State. It is therefore made clear in Art. 5(2) that the requesting State should include information about the conservation, security and accessibility of the cultural object after it will be returned to the requesting State. It se«*^/i fair that the requesting State should make clear that th^s object will not simply be passed back onto the market if in fact a requested State has had the obligation to retrieve it from one of its own citizens and return it.

Article 6 enables a State to refuse to return an object if it finds that it has as close a connection with its own culture or indeed a closer one. This was felt necessary because there are a number of cases where an item is equally important to the culture of two or even more states. It was felt unreasonable to oblige a State return an object in such a situation. It should be noted that this is the only exception *to* the obligation to return provided the conditions of Article 5(3) are fulfilled. The exception may also apply where the object concerned has as close or a closer connection with some other culture. There is no doubt that some objects may be part of the cultural heritage of several States, a possibility recognized by Article 4 of the 1970 Unesco Convention.

There are certain limitations on claims made under Article 5. These are provided for in Article 7. The first of

these concerns the export of a cultural object during the lifetime of its creator. It is generally accepted that export should not be hindered in such cases since the development of an overseas market or the free sale of a person's creative work should not be hindered during their lifetime. This freedom for the artist acts as an encouragement of further creative activity. In some States, provision is made that export control shall not apply until a certain period after one's death. This is so that the benefits of the artist's creative work can be retained by his immediate family for a period after his death. However, the majority of the Committee of experts agreed to a period of 50 years following the death of that person. This, in my view, is far too long. The legislation in France, which has long experience in this regard, provides for protection for a period of only 20 years after the death of the artist.

The period of fifty year was chosen by analogy with the period used for the exploitation of copyright under the international conventions on that topic. For those objects to which copyright conventions would apply (a small proportion of those covered by the new draft Convention), States would not put export controls on them (for this would be in breach of their international obligations) so the new draft Convention would not in any case apply. On the other hand there are a great many cultural objects (such as ethnographic objects) where copyright provisions do not apply and, indeed, are totally inappropriate. The provision as

it now stands will substantially hinder recovery of ethnographic objects, many of which are organic and could be shown to be less than 50 years old, even where though identity of the creator is not known, and, in many communitites, not relevant. In any event the considerations relating to copyright are very different from those concerning cultural objects of the sort being covered by the UNIDROIT draft. Theve is no necessary analogy between the protection of heritage objects under the UNIDROIT draft and the protection of rights of reproduction under the copyright conventions. Nor is the period of 50 years used in cultural heritage legislation of a majority of states, it is particularly inappropriate to some indigenous communities where the cult of the artist as an individual is less strong, and members of the community, other than the successors in law, may have strong feelings about artistic works which embody communal traditions.

Paragraph (b) concerns time limitations on claims. There are also some problems with the formulation of this article, e.g. the suggestion that one can locate the period of time when the requesting State knew or ought reasonably to have known the location or identity of the possessor of the object. While it is one thing to say, as one has under Article 3, that an individual plaintiff should have known the location or identity of the possessor, it is another thing altogether to try and impute knowledge to a State. Will a State be required to know where an object is if in fact it is in a foreign museum ? Does

it matter whether the foreign State has diplomatic relations with that State ? Can it be assumed that one of the function of diplomats of that State would be to examine museum exhibition catalogues to establish whether any material which has been illegally exported from that State is to be found in the fttate where they are working ? This seems quite unrealistic : the Unesco Inter-governmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Expropriation found that a proposal to collect auction catalogues and make them available to foreign States was impractical. There is also the question of how far one can assume that the various agencies within a bureaucracy transmit information to one another or even realize its significance. This is true even in the complicated bureaucracies of western societies; it is even more difficult to exact such accurate transmission of information in the less well resourced or more recently developed bureaucracies of developing States, many of whom will be those most affected by illicit export. The Cultural Property Committee of the International Bar Association, commenting on this provision at its meeting in New York in September 1990, criticized the use of different limitation periods for theft (Article 3(2)) and illegal export (Article 4(b)). Twenty years also seems a very short period in the life of a cultural object : it would make it easy for foreign museums to encourage donations of cultural objects which had been knowingly illegally exported and held in private

collections, provided only that this period (which is less than the lifetime of a private collector) had elapsed. Finally, it will be always difficult to prove the date of illicit export since the event is, in the nature of things, always concealed.

The third provision in Article 7 was included to prevent an obligation to return an object where restrictive export laws in the state of origin had been changed and in fact the export, if it were to occur at the time of the request, would no longer be regarded as illicit. States mty feel able to repeal legislation if they consider there is nothing of a particular category of cultural material left to protect. If the provision is adopted as it stands, States will need to be careful not to do so. The exclusion in Article 7 need not be applied by States whose legislation is already more ganerous than this (Art. 11).

Article 8 provides in the case of illicit axport, as in the case of theft, for compensation of a possessor. The study group spent some time discussing what would be the adequate measure of compensation. There are various possibilities. Ona would be the purchase price. Another would be the purchase price plus interest. Another would be the commercial value of the object in the state of location or in the State of origin. All of these have considerable difficulties. It was decided that the phrase "fair and reasonable compensation" would allow the judge to take into account not only the differences

between these various prices *Y-.t* also the circumstances of the particular case, eg. the conduct of the *bona fide* possessor and the ability of the requesting State to pay. Of course, the provision of compensation at all can give rise to the same kind of considerations as in respect of theft : the difficulty of those entitled to retrieve valuable cultural property. But here, where there is virtually no previous tradition to refer to, as the *neuo dat* rule at least provided in the case of theft, there seemed even less likelihood of "importing" States becoming party if some provision for compensation were not included.

Article 8(2) is a more controversial and a more innovative provision. This was originally a proposal of the first draft examined by the Committee. The suggestion was that it would be more acceptable to states of collectors to require a collector to return an item to an oxporting state if he were not deprived of property in it but given some say in its disposition. However, the first draft would have made it possible for such a person to decide to return it to the original exporter. This would of course encourage the illegal exporter to offer to sell items on the understanding that, if a purchaser were required to return it, he wouW return the purchase price. This arrangament would put the object back in the hands of a person who had already broken the law and no doubt would have no compunction in breaking it again, by selling it to a purchaser in a country which was not a c \rry

party to the Convention. The Article was then re-worded that the person to whom the *bona fide* purchaser chooses to transfer the object must provide the necessary guarantees that the object will not again be illicitly exported. Where such an item is returned on those conditions, it is not to be confiscated nor subjected to other measures to the same effect. "Other measures to the same effect" does not include requirements of access, maintenance or classification which are commonly applied to important items of the cultural heritage and which could still be validly applied after a return under this provision.

Article 8(3) provides that the cost of returning an object under this provision is to be borne by the requesting State. While a return under Article 8(1) to the representatives of the requesting State make the costs of expedition its responsibility, it seems somewhat unfair to expect the same for a return under Art. 8(2). For articles in fragile condition, conservation and insurance costs may be quite substantial, though probably less than the cost of compensation would have been, but since the state may have only limited control over the object after its return it may find it hard to justify the expenditure of large sums of public money for the costs of return of an object illegally exported. It would seem preferable to leave this matter to the discretion of the judge ordering the return.

Earlier drafts included a provision permitting the judge or other appropriate body to refuse to enforce a law which was contrary to public policy ("ordre public"). A majority of the Working Group felt it unwise to retain this provision, since judges need no encouragement to invoke what is, in every legal system, a very uncertain category and one which has been much criticized by scholars. About the only case where such an exception might be justified, the experts felt, would be where a government's heritage legislation was based on unacceptable discrimination against a particular culture[11]. The much narrower exceptions of Article 7 were substituted for the more g«!?eral provision. It was felt quite clear, however, that a foreign export law which met the provisions of the Preliminary Draft Convention would not be able to be excluded on grounds of "public policy", since the acceptance of States of the obligations of the Preliminary Draft Convention would be a declaration that it was public policy to apply such laws in the circumstances set out in the Convention.

Claimants have an option under Article 9 to bring a claim either in the State of location of the object, or in the State where the possessor has his habitual residence. The granting of jurisdiction to a court or other competent authority in the State where the object is located, or where the possessor is habitually resident is an important article which recognizes the complexity of modern dealings in art. These grounds of

11 **Oppenheimer c. Catermole 1976 A.C. 249 [United Kingdom].**

jurisdiction are in addition to those traditionally provided. The reference to residence (rather than domicile) and to location of the object are particularly interesting. Many cultural objects may now be owned by corporations who, for fiscal reasons, are domiciled in distant places (the Virgin Islands, for example) while the sought cultural object is in the sale room of a major capital.

Article 10 (non-retroactivity) is not necessary to the Convention since, by customary international law, embodied in the 1969 Vienna Convention on Treaties (Article 28), a treaty is not interpreted retrospectively. The same is true, of course, of the 1970 Unesco Convention, though the possibility of retrospectivity has at times appeared to worry some States - quite unecessarily. The inclusion of Article 10 is to allay any such worries, unjustified though they may be. However, States who wish to apply the Convention to cases where the theft or illegal act preceded the date of antry into force of the Convention may do so (Art. 11(c)). There is little doubt that a legal commitment to the draft, even if prospectively only, is a commitment in principle to hinder the illicit trade. Such a commitment may well encourage institutions in those States to act on those principles when asked for the return of objects illicitly traded before the date of entry into force of the Convention. (It should be noted that many museums are in any event bound by their own ethical

acquisitions policies[12], formulated on the ICOM code of Professional Ethics[13], not to acquire, evaluate or authenticate objects which have been in illicit trade).

Article 11 permits States to give wider protection to a claimant than the minimal uniform rules laid down in the draft.

The earlier drafts of Articles 3 and 4 spoke of objects which had been the object of theft or other illegal acts (acts which offended against criminal law). This was intended to cover acts such as fraudulent conversion, which in some systems of law are equated to theft, but in the Common Law generally are not. This was an admirable attempt to bring the different legal systems closer together on this point, but there were two problems with it. One was the divergence of views as to whether the act had to be a criminal offence or whether a civil wrong sufficed. The other was the fact that, since the *nemo dat* rule did not apply to fraudulent conversion in Common Law systems, such a decision might require special legislation in these jurisdictions, and, where federal systems were involved (e.g. Australia, Canada and United States), this would slow the pace of adoption dramatically, and might even halt it completely. The problem was resolved by restricting

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12 **Examples given and discussed in Prott and O'Keefe, book cited N.2, 126-133.**

13 **International Council of Museums, *Coda of Professional Ethics* (Paris, 1986) now available in 15 languages.**

the operation of Articles 3 and 4 to theft, but allowing extension by States to "acts other than theft where ay the claimant has wrongfully been deprived of possession of the object" (Art. 11(a)(i)).

Article 11(a)(ii) allows a court to hear a claim beyond the limitation period set out for thaft in Article 3(2). Claims for objects stolen from French museums, for example, because they are public property, are imprescriptible and France can retain that rule. States whose museum property is not so protected (i.e. because the property of museums is not considered to be public property, or for any other reason) should now consider whether they want to improve the legal protection of objects which are intended for public use and whose acquisition has often been supported by substantial public funds.

Article 11 (iii) allows a State to apply its national law when this would disallow the possessors' right to compensation event when the possessor has exercised the necessary diligence contemplated by Article 4(i). This protects the *nemo dat* rule in Common Law jurisdictions and thus continues to provide a higher level of protection to a dispossessed owner in those jurisdictions than in those which presently protect the bona fide purchaser completely after a short period, and will continue to protect him or her after the adoption of the Convention if he or she has used the necessary diligence.

According to Article 11 (b), a State may also be more generous than the basic standard set out in the draft Convention. For example, it may give relief to a Requesting state more generously than as foreseen in Article 5 which specifies five important interests, one of which has been injured by the illicit export. The requested State may take other interests into account and it may therefore give relief to a much wider class of objects than is given by requested States who limit the action to the strict provision of the convention. For example a requested State may decide to return an object which was on the territory of the requesting State before export but was in a private collection not accessible to the public, was an individual item whose context, if any, was unknown or had long since been destroyed and which is of significance, but perhaps not outstanding cultural significance (Article 11(b)(ii)).

The requesting State may also be more generous than the strict terms of the convention by returning objects exported during the lifetime or immediately after the death of its creator, but more generous admission of claims (limited to 5 years from date of knowledge and 20 from date of occurrence by Article 7(b)) or by returning an object which was illegally exported but whose export would now be legal. These provisions will be useful to countries such as Australia and Canada which have legislation authorizing the return of objects illegally exported from their countries of origin[14] but where some of

14 **Protection of Movable Cultural Heritage Act 1986 as amended**

these questions have not been regulated. For example, the Australian legislation declares a "prohibited import" any object forming part of the movable culturel heritage of a foreign country whose export was prohibited by a law relating to cultural property and which has been exported[15]. If the foreign legislation related to objects which might be subject to export control within 20 years after their creator's death (as Australia's own legislation does, and contrary to the 50 years rule in the UNIDROIT draft), then it could still maintain that rule and return such an object according to Article 11(b) of the UNIDROIT draft.

Throughout the draft (Arts. 5,6,7,9,11) the provisions speak of "courts or other competent authorities". Aware of the long practice of administrative authorities in cultural matters, the working group has left it to national authorities to determine whether a judicial or other tribunal or body is the appropriate jurisdiction to decide iiisues in relation to stolen or illegally exported cultural material.

At the second session of the study Group a provision was considered which, for the purposes of applying the articles on theft and illicit export, provided that a cultural object forming part of a collection, set or series shall be considered to be a single object whon the same person has been

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[Australin]; Cultural Property Import and Export Act 1975 [Canada].

15 Ss. 3, 14 of Statute cited in N.14.

deprived of possession of it or when its export has infringed a prohibition, and when it is in the possession of a single person.

This provision had more relevance when return depended on the commercial value of "an object" since a collection might be made up of items each of which, individually, were less than the value concerned although as a collection the value very much exceeded it. In the present text of the Convention it would not be completely without reason, since in its present drafting it is not related merely to commercial value, but is also applicable to heritage value. Cases have occurred where cultural objects not of great importance in themselves but of great importance as part of a study collection have been separated and exported and have thus destroyed the value of the collection[16].

General comments

The preliminary draft Convention is clearly a compromise of views. Developing (exporting) States will be disappointed at the retention of the idea of compensation. Ine difficulty that some would have in recovering valuable heritage objects was

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16 **The most notable example being that of the Brown collection, an important group of ethnographic objects from New Ireland and New Britain in the Bismarck Archipelago n6rth east of Papua New Guinea including of 3,000 objects which was dispersed on its sale by the University of Newcastle, U.K. in 1986.**

present to the Committee of experts. While it was felt necessary to make that provision so as to encourage States to change their rules protecting the possession of such objects by a *bona fide* purchaser, the right to compensation has been limited to purchasers who really are *bona fide,* not those who are careless or who turn a blind eye to suspicious circumstances, or who simply make no enquiry. Furthermore, the amount of compensation is not tied to a fixed price (purchase price, market value at place of location, etc..). The judge may choose a "fair and reasonable" sum which is less than either. A precedent is available for judges to award less than the purchase price where the circumstances show this to be just[17]. Finally there rests the possibility of seeking international aid for assistance in recuperating such material. In a recent incident Thailand retrieved a stolen object from a United States Museum after a private foundation purchased and donated a work of comparable value to the museum concerned. This illustrates the essential role which foundations may be able to play in ensuring that the new draft Convention works for claimants in economic difficulties.

Collecting States may be uneasy about the lack of precise definition of objects covered by the Convention. For reasons discussed above, I think this concern is not justified. The Convention, though it advances the rights of States of origin to

17 ***Btihrle v. Fischer,*** **an unreported Swiss case of great interest in this connection, discussed in Prott and O'Keefe, book cited N.2, 415.**

the return of illegally exported cultural objects, clearly does so in a modest way. Decisions on return will be taken, in general, by the courts (or administrative tribunals) of the collecting States. The importance of an illegally exported object to the requesting State will have to be proved by it to those bodies according to the criteria of Article 5(1).

The Preliminary Draft Convention concentrates on the recovery of objects in illicit trade. It should therefore be of special interest to members of the European Common Market, since detection of theft and attempted export by customs examination at the internal European frontiers will not be possible after 1992, and adequate means of recovery will be essential.

One disappointing feature of the Study Group's work was its failure to deal with questions of private law other than that of the bona fide purchaser. It has not dealt with questions of private international law such as those concerning standing, choice of law or suitable connecting factors for the application of "lex rei sitae".[18] In one sense this is understandable, since the issue of the bona fide acquirer was already a complex and difficult issue, and the addition of others would have slowed down the discussion and probably also its potential attractiveness for States. On the other hand, the suggestion of one member of the Study Group that such issues should be

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18 **This was considered in the first report of Reichelt, cited n*5 above, 91, 125-127.**

regulated by a third convention developed by The Hague Conference for Private International I-aw iu somewhat disheartening - there is already the (mainly public law) Convention of Unesco 1970 and now the UNIDROIT draft on private law aspects, without adding a third Convention, all dealing with the same subject matter. This reinforces the importance of experts in this area of law who can draw on all areas of law : public law (including administrative law, international law and penal law) as well as private law (contract, property and private international law) to weld together an appropriate, specialized regime for this very significant area of activity.

Relationship to the 1970 Unesco Convention

The Preliminary Draft Convention should appeal to States who deprecate the illicit trade in cultural objects but, for various reasons, have hesitations about becoming party to the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of cultural Proporty. That Convention has a very general obligation (Art.3) on States Parties to regard export of cultural objects contrary to national laws adopted by States Parties under the Convention together with specific obligations (in Arts. 7 and 9) restricted to specified categories of material (property stolen from museums or similar institutions,(Art. 4)/ archaeological and ethnological materials of State whose cultural patrimony is in jeopardy (Art. 9). The flexibility (or ambiguity) of the

Convention has led to diverse interpretations and, in some cases, to reluctance to adhere to the Conventions.

The new UNIDROIT Draft Preliminary Convention is free of these ambiguities, while leaving a margin of appreciation to those applying the Convention which should ensure sufficient flexibility in its operation.

It applies to all stolen objects (Art. 3) of artistic, historical, spiritual, ritual or other cultural significance (Art.2) whether in private or in public hands, whether taken from a collection or an individual item. In that sense it is wider than Article 7 of the Unesco Convention.

It applies to illegally exported objects (Art. 5) of the same kind of significance (Art. 2) whose removal significantly impairs an important cultural interest (Art. 5(3)). In that sense it is narrower than Article 3 of the 1970 Unesco Convention but much more specific, and it provides a procedure applying to important illegally exported objects other than ethnographical and archaeological materials mentioned in Article 9 of the 1970 Unesco Convention. Furthermore, the obligations of the requested State are more detailed, and should be easier and more straight-forward for Requesting States to put in operation, since States Parties to the 1970 Unesco Convention have adopted differing means of implementing Article 9 of that Convention.

In cases of theft the brief mention of "compensation to an innocent purchaser or a person who has valid title" in Article 7(b)(ii) of the Unesco Convention has been complemented by the much more detailed and less ambiguous provisions of Article 4 of the Preliminary Draft Convention requiring a possessor, if ha or she is to be compensated, to have exercised Nthe necessary diligence".

There is no reference to compensation in Article 9 of the Unesco Convention which applies to pillage of archaeological materials for which import controls may be requested. In Article 5 of the UNIDROIT Draft Preliminary Convention this limitation is removed : a possessor of any category of important cultural objects may have to return it, but will be compensated unless the possessor knew or ought to have known that the object would be, or had been, exported contrary to the export legislation of the Requesting State.

The UNIDRoIx Fidliminary Draft Convention thus deals with some of the most difficult issues remaining doubtful or unresolved after the adoption of the 1970 Unesco Convention. For the 69 parties to that Convention, it represents a step towards greater protection of their movable cultural property. For important market States such as the United Kindgom and France, support for the draft would represent a step forward in their expressed espousal of the principles of the Unesco Convention, without the doubts which were annexed to interpretation of the

latter. (An export from each of these States made substantial contributions to the work of the Study Group in Rome). For Switzerland, another important market state, there is a degree of flexibility in the assessment of compensation which reflects Swiss precedents on "bona fides".

It is important that this significant initiative be carefully considered. The future Convention would be an important addition to work already done by Unesco to assist States in the control of illicit traffic. These activities include the circulation of notices from States Parties of the 1970 Convention of cultural objects which are missing and may be illicitly traded on the international market, the organization of regional seminars on the subject.-[19]; the publication of national legislation on the subject[20], the work of the Intergovernmental Committee for Promoting the Return of Cultural Property to its Countires of Origin or its Restitution in case of Illicit Appropriation[21], and the publication of a report on national controls on the illicit

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19 **See, for example, the report of the Asian and South Pacific Region, "*Protection or Plunder*" ed. by Prott, L.V. and O'Keefe, P.J. (A6IP, Canberra, 1988).**

20 **Unesco, "The *Protection of Cultural Property : Compendium of Legislative Texts*" (Paris, 1984) contains the relevant extracts from national legislation relating to cultural movables. The full texts of legislation of 45 countries on the topic for 26 other countries has been published in separate leaf lei's (25 of these are also in French; 5 in Spanish). There* is also, Prott, L.V. and O'Keefe, P.J., *Handbook of National Regulations Concerning the Export of Cultural Property* (Unesco, Paris 1988).**

21 **The Committee will hold its 8th Session in Greece in spring 1991. An assessment of the work of the Committee will be found in Prott and O'Keefe work cited n*2, 855-861.**

trade.[22] While the majority of the experts came from European countries, there were experts from Nigeria, Mexico, Australia and Italy, which all have particular concerns with illicit export of cultural objects, and tiie special problems of poorer States were carefully considered throughout. The future Convention should, when adopted, make a further important contribution to the hindrance of the illicit trade in cultural objects.

PRELIMINARY DRAFT UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS

CHAPTER I " SCOPE OF APPLICATION AND DEFINITION

Article 1

This Convention applies to claims for the restitution of stolen cultural objects and for the return of cultural objects removed from the territory of a Contracting State contrary to its export legislation.

Article i

For the purpose of this Convention, "cultural object" means any material object of artistic, historical, spiritual, ritual or other cultural significance.

CHAPTER II - .DESTITUTION OF STOLEN CULTURAL OBJECTS

Article 3

1)The possessor of a cultural object which has been stolen shall return it.

2)Any claim for the restitution of a stolen cultural object shall be brought within a period of three years from the time when the claimant knew or ought reasonably to have known the location, or the identity of the possessor of the object, and in any case within a period of thirty years from the time of the theft.

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22 Prott, L.V. and O'Keefe, P.J. *National Legal Control of Illicit Traffic in Cultural Property* (Unesco, Paris, 1982).

Article 4

(1) The possessor of a stolen cultural object who is required to return it shall be entitled to payment at the time of restitution of fair and reasonable compensation by the claimant provided that the possessor prove that it exercised the necessary diligence when acquiring the object»

(2) In determining whether the possessor exercised such diligence, regard shall be had to the relevant circumstances of the acquisition, including the character of the parties and the price paid, and whether the possessor consulted any accessible register of stolen cultural objects which it could reasonably have consulted.

(3) The conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor.

CHAPTER III - RETURN OF ILLEGALLY EXPORTED CULTURAL OBJECTS

Article 5

(1) When a cultural object has been removed from the territory of a Contracting state (the requesting State) contrary to its export legislation, that State may request the court or other competent authority of a State acting under Article 9 (the State addressed) to order the return of the object to the requesting State.

(2) To bet admissible, any request made under the preceding paragraph shall contain, or be accompanied by, the particulars necessity to enable the competent authority of the State addressed to evaluate whether the conditions laid down in paragraph (3) are fulfilled and shall contain all material information regarding the conservation, security and accessibility of the cultural object after it has been returned to the requesting State.

(3) The court or other competent authority of the State addressed shall order the return of the cultural object to the requesting State if that State proves that the removal of the object from its territory significantly impairs one or more of the following interests :

(a) the physical preservation of the object or of its context,

(b) the integrity of a complex object,

(c) the preservation of information of, for example, a scientific or historical character,

(d) the use of the object by a living culture,

(e) the outstanding cultural importance of the object for the requesting State.

Article 6

When a State has established its claim for the return of a cultural object under Article 5(3) the court or competent authority may only refuse to order the return of that object when it finds that it has as close a, or a closer, connection with the culture of the state addressed or of a State other than the requesting State.

Article 7

The provisions of Article 5 shall not apply when :

(a) the cultural object was exported during the lifetime of the person who created it or within a period of fifty years following the death of that person; .or

(b) no claim for the return of the object has been brought before a court or other competent authority acting under Article 9 within a period of five years from the time when the requesting State knew or ought reasonably to have known the location, or the identity of the possessor, of the object, and in any case within a period of twenty years from the date of the export of the object, or

(c) the export of the object in question is no longer illegal at the time at which the return is requested.

Article 8

(1) When returning the cultural object the possessor may require that, at the same time, the requesting State pay it fair and reasonable compensation unless the possessor knew or ought to have known at the time of acquisition that the object would be, or had been, exported contrary to the export legislation of the requesting State.

(2) When returning the cultural object the possessor may, instead of requiring compensation, decide to retain ownership and possession or to transfer the object against payment or gratuitously to a person of its choice residing in the requesting State and who provides the necessary guarantees. In such cases the object shall neither be confiscated nor subjected to other measures to the same effect.

(?) The cost of returning the cultural object in accordance with this article shall be borne by the requesting State.

(4) The conduct of a predecessor from whom the possessor has acquired the cultural object by inheritance or otherwise gratuitously shall be imputed to the possessor.

CHAPTER IV - CLAIMS AND ACTIONS Article 9

(1) The claimant may bring an action under this Convention before the courts or other competent authorities of the State where the

possessor of the cultural object has its habitual residence or those of the State where that object is located at the time a claim is made.

(2) However the parties may agree to submit the dispute to another jurisdiction or to arbitration.

CHAPTER V - FINAL PROVISIONS Article 10

This Convention shall apply only when a cultural object has been stolen, or removed from the territory of a Contracting State contrary to its export legislation, after the entry into force of the Convention in respect of the Contracting State before the courts or other competent authorities of which a claim is brought for the restitution or return of such an object.

Article 11

Each Contracting State shall remain free in respect of claims brought before its courts or competent authorities :

(a) for the restitution of a stolen cultural object :

(i) to extend the provisions of Chapter II to acts other than theft whereby the claimant has wrongfully been deprived of possession of the object;

(ii) to apply its national law when this would permit an extension of the period within which a claim for restitution of the object may be brought under Article 3(2);

(iii) to apply its national law when this would disallow the possessor's right to compensation even when the possessor has exercised the necessary diligence contemplated by Article 4(1).

(b) for the return of a cultural object removed from the territory of another Contracting State contrary to the export legislation of that State;

(i) to have regard to interests other than those material under Article 5(3);

(ii) to apply its national law when this would permit the application of Article 5 in cases otherwise excluded by Article 7.

(c) to apply the Convention notwithstanding the fact that the theft or illegal export of the cultural object occurred before the entry into force of the Convention for that State.

CHAPITRE I - CHAMP D*APPLICATION ET DEFINITION Article premier

La presence Convention s'applique aux demandeo de restitution de biens cul- turels voles ainsl qu'aux demandes vlsant le retour de blens culturels export£s du terrltolre d'un Etat contractant en violation de sa legislation en matiere d'exportation.

Article 2

Au sens de la presente Convention, le tenne "bleu culturel" designe tout objet corporel revetant une Importance culturelle, notamment artistique, histo- rlque, splrltuelle ou rituelle.

CHAPITRE II - RESTITUTION DES BIENS CULTURELS VOLES

Article 3

1.Le possesseur d'un blen culturel vole est teuu de le restituer.

2.Toute demande de restitution d'un blen culturel vole doit etre introduite dans un delai de trois ans a compter du moment ou le demandeur a connu ou aurait du raisonnablement connaitre l'endroit ou se trouvait le blen ou l'identite du possesseur, et dans tous les cas, dans un. delai de trente ans a compter du moment du vol.

Articlc 4

1.Le possesseur d'un bien culturel vole qui est tenu de le restituer a droit au paiment, au moment de la restitution, d'une indemnite equitable par le demandeur sous reserve que le possesseur prouve qu'il a exerce la diligence requise lors de 1'acquisition.

2.Pour determiner si le possesseur a exerce unc telle diligence, il sera tenu compte des circonstances pertinentes de 1*acquisition, y conpris la quallte des parties et le prix paye, ainsl que le fait que le possesseur a consulte un registre accessible de biens culturels voles qu'il aurait pu raisonnablement consulter.

3.Est assimile au comportement du possesseur celui de son predecesseur dont 11 a acquis le bien culturel par heritage ou autrement a titre gratult.

CHAPITRE III - RETOUR DES BIENS CULTURELS ILLICITEMENT EXPORTES

Article 5

1. Lorsqu'un bien culturel a ete exporte du terrltolre d'un Etat contractant (l'Etat demandeur) en violation de sa legislation en matiere d*exportation, cet Etat peut demander au tribunal ou a toute autre autorite comp^tente d'un Etat en vertu de 1'article. 9 (l'Etat requis) que soit ordonne le retour du bien dans l'Etat demandeur.

2.Toute demande introduite en. vertu du paragraphe precedent doit etre accom- **pagn**£e, pour etre recevable, des precisions permettanc a l'autorite competente de l'Etat requis d'appr£cier si les conditions

prevues au paragraphe 3 sont reoplies et doit contenir toute information utile sur la conservation, la securite et I'accessibilite du bien culturel. apr^s son retour dans l'Etat demandeur.

3.Le tribunal ou toute autre autorite competente de l'Etat requis ordonne le retour du bien culturel dans l'Etat demandeur lorsque cet Etat prouve que 1'exportation du bien de son terrltolre porte une atteinte significative a l'un ou 1'autre dea interets suivants :

(a) la conservation physique du bien ou de son contexte ;

(b) l'integrite d'un bien complexe ;

(c) la conservation de 1*information, par example de nature scientifique ou historique, relative au bien ;

(d) 1'usage du bien par une culture vivante ;

(e) 1'importance culturelle particuliere du bien pour l'Etat demandeur.

Article 6

Lorsque les conditions du paragraphe 3 de 1'article 5 sont remplies, le tribunal ou l'autorite competente ne peut refuser d'ordonner le retour du bien culturel que s'il estime que ce bien presente, avec la culture de l'Etat requis ou d'un autre Etat, un lien aussi etroit ,ou plus etroit qu'avec celle de l'Etat demandeur.

Article 7

Les dispositions de 1'article 5 ne s'appliquent pas :

(a) lorsque le bien culturel a ete exporte du vivant de la personne qui l'a cree ou au cours d'une periode de cinquante ans apres le deces de cette personne ; ou

(b) lorsque aucune demande de retour du bien n'a ete introduite devant un tribunal ou toute autre autorite competente en vertu de 1'article 9 dans une periode de cinq ans a compter du moment ou l'Etat demandeur a connu ou aurait du raisonnablement connaitre l'endroit ou se trouvait le bien ou l'identite du possesseur, et dans tous lo.s cas, dans une periode de vingt ans a compter de la date de l'exportation du bien ; ou

(c) lorsque l'exportation du bien en question n'est plus illlcite au moment ou le retour est demande.

Article 8

1.Lors du retour du blen culturel, le possesseur peut exiger de l'Etat demandeur le paiement concomitant d'une indemnite equitable, a moins que le possesseur n'ait su ou du savoir, au moment de l'acquisition, que le bien devait etre ou avait ete exporte en

violation de la legislation en matiere d'exportation de l'Etat demandeur.

2.Lors du retour du bien culturel, le possesseur peut decider, en lieu et place de cette indemnite, de rester proprletalre .iu bien ou de le transferer a titre onereux ou gratuit a une personne de son choix residant dans l'Etat demandeur et presentant les garantles necessaires. Dans ces cas, le bien ne peut pas etre confisque ni faire l'objet d'une autre mesure ayant les memes effets.
3. Les depenses decoulant du retour d«< bien culturel conformement au present article incoobent a l'Etat demandeur.

4. Est assimile au comportement du possesseur celui de son predecesseur dont 11 a acquis le bien par heritage ou autrement & titre (jratult.

CHAPITRE IV - DEMANDES ET ACTIONS Article 9

1.Le demandeur peut introduire une action en vertu de la presente Convention devant les tribunaux ou toutes autres autorites competentes soit de l'Etat ou reside habituellement le possesseur du bien culturel, soit de l'Etat ou se trouve le bien culturel.

2.Toutefois, les parties peuvent convenir de soumettre leur differend a une autre juridiction ou a l'arbitrage.

CHAPITRE V - DISPOSITIONS FINALES Article 10

La presente Convention s*applique seulement lorsqu'un bien culturel a ete vole, ou exporte du territoire d'un Etat contractant en violation de sa legislation en matiere d'exportation, apres l'entree en vigueur de la Convention a l'egard de l'Etat contractant dont les tribunaux ou autres autorites competentes ont ete saisis d'une demande de restitution ou visant au retour d'un tel bien.

Article 11

Chaque Etat contractant conserve la faculte nour les demandes introduites devant ses tribunaux ou autorites competentes :

(a) visant la restitution d'un bien culturel vole :

(i) d'etendre les dispositions du chapitrn II a des actes delictueux autres que le vol par lesquels le demandeur a ete depossede du bien ,*

(ii) d'appliquer sa loi nationale lorsque cela a pour effet d'etendre la periode durant laquelle la demande de restitution du bien peut etre introduite en vertu du paragraphe 2 de 1'article 3 ;

(ill) d'appliquer sa loi nationale lorsque cela a pour effet de priver le possesseur de son droit a indeonite meme lorsque celui-ci a exerce la diligence requise mentionnce au paragraphe 1 de l'article 4 ;

(b) visant le retour d'un bien culturel exporte du territoire d'un autre
Etat contractant en violation de la legislation en matiere d'exportation
de cet Etat :

(i) de tenir compte d'autres interets que ceux qui sont vises au paragraphe 3 de l'article 5 ;

(ii) d'appliquer sa loi nationale lorsque cela a pour effet d'appliquer les dispositions de l'article 5 dans des cas qui sont exclus par les dispositions de l'article 7 ;

d'appliquer la Convention nonobstant le fait que le vol ou l'exportation illicite du bien culturel ont eu lieu avant **l**'entr^e en vigueur de **la** Convention a l'egard de cet Etat.